Grinnell Fire Protection Systems Company *and* Road Sprinkler Fitters Local Union No. 669, U.A., United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO. Cases 5–CA–24521, 5–CA–25227, and 5–CA–25406

December 20, 2001

ORDER DENYING MOTION

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On May 28, 1999, the National Labor Relations Board issued a Decision and Order in this proceeding.[1] The Board found that the Respondent had violated the Act by, inter alia, unilaterally changing terms and conditions of employment when it implemented its final offer before impasse had been reached in negotiations for a new collective-bargaining agreement. The Board ordered the Respondent to, inter alia, restore to unit employees the terms and conditions of employment applicable before the Respondent's unlawful implementation and make them whole for any losses suffered by reason of the unlawful changes in terms and conditions. On December 29, 2000, the United States Court of Appeals for the Fourth Circuit enforced the Board's Order, and on October 1, 2001, the United States Supreme Court denied the Respondent's petition for certiorari.

On July 31, 2001, the Charging Parties filed a motion for clarification of the Board's Decision and Order. The Charging Parties request that the Board hold that the term "unit employees" in its Order includes not only "crossover" employees who continued to work during the nationwide unfair labor practice strike that was called on the night of April 12, 1994, but also strike replacements hired by the Respondent after the strike began.

On August 17, 2001, the Respondent filed an opposition to the Charging Parties' motion, contending that the strike replacements should not be included among the "unit employees" for purposes of the Board's Order.

The Board has considered the submissions of the parties and has decided, for the reasons stated below, to deny the Charging Parties' motion.

The Charging Parties rely on *Carpenter Sprinkler Corp.*, 238 NLRB 974 (1978), enf. denied in relevant part 605 F.2d 60 (2d Cir. 1979). There, however, the Board's decision and order—in marked contrast to this case—clearly and explicitly stated that make-whole relief would extend to strike replacements. Here, as we will explain, the Board used the phrase "unit employees," which certainly could be construed to exclude striker replacements from the remedy.

Here, the General Counsel did not seek, and the Board did not include, an order extending the remedy to replacements. Thus, the Charging Parties were on notice that there was no such remedy in the Board's Order. In addition to the absence from the Board's Order of any indication that the strike replacements were included in its remedial order, the timing of the Charging Parties' motion also weighs heavily against it. More than 2 years elapsed between the Board's Decision and Order and the filing of the Charging Parties' motion. In the interim, of course, the Fourth Circuit enforced the Order.

The situation here is the obverse of the one in *Yorkaire*, 328 NLRB 286 (1999). In that case, the Board order was clear that replacements for unfair labor practice strikers were to be included in the remedy, even though they were not unit employees. Thus, the employer's belated contention against this remedy was rejected. The Board said (at 288):

> We also conclude that the strike replacements are entitled to a remedy. As to this remedial issue, the Respondent acknowledges the similarities between this case and *Carpenter Sprinkler Corp.*, supra, in which the Board held that, when unlawful unilateral changes in unit employees' wages and benefits preceded, and were the precipitating cause of, a strike, the remedy for the unlawful changes properly covered both the striking employees and their temporary replacements, who were paid at the unlawfully implemented wage and benefit rate. 238 NLRB at 976. The Respondent nevertheless argues for the first time in its exceptions to the compliance specification that *Carpenter Sprinklers* was wrongly decided and that the striker replacements should not, as a matter of law, be entitled to a remedy. We reject this belated contention for the following reason. In the underlying case, the General Counsel sought a remedy for "sheet metal workers", specifically including those sheet metal workers who were replacements for unfair labor practice strikers. (The General Counsel avoided the term "unit employees," as that term could be construed to exclude replacements for unfair labor practice strikers.) In agreement with the General Counsel, the judge awarded the remedy to

[1] 328 NLRB 585 (1999), enfd. 236 F.3d 187 (4th Cir. 2000), cert. denied 122 S.Ct. 49 (2001).

> "sheet metal workers." The Board agreed, and the court enforced the order. The Respondent did not argue to the Board that this remedial order was erroneous in this respect, i.e., that replacements for unfair labor practice strikers should not share in the 8(a)(5) remedy because they are not unit employees, and, because Respondent did not do so, it was not free to raise the issue before the circuit court. Moreover, even if Respondent had raised these issues, the order is now res judicata. In these circumstances, Respondent cannot belatedly make the contention now. [Footnotes omitted.]

The Charging Parties' motion, though styled as one for clarification, may more accurately be described as one seeking additional substantive relief. Thus, the Charging Parties are essentially asking the Board to change the Order that has already been enforced by the Fourth Circuit. The Board, however, is without authority to change such an order, as Section 10(e) of the Act provides that upon the filing of the record in a United States court of appeals, "jurisdiction of the court shall be exclusive and its judgment and decree shall be final," subject, of course, to review by the Supreme Court. Accordingly, because, as noted above, the Board's Order has already been enforced by the Fourth Circuit, and the Supreme Court has denied certiorari, we no longer possess jurisdiction to modify that Order. *Haddon House Food Products*, 260 NLRB 1060 (1982); *Royal Typewriter Co.*, 239 NLRB 1 (1978). See also *NLRB v. Mastro Plastics Corp.*, 261 F.2d 147, 148 (2d Cir. 1958); cf. *Flav-O-Rich, Inc. v. NLRB*, 531 F.2d 358, 361 (6th Cir. 1976).

For the foregoing procedural reasons, we deny the Charging Parties' motion and we reaffirm that the Board's Order in this proceeding does not extend make-whole relief to strike replacements.[2]

Dated, Washington, D.C. December 20, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[2] Chairman Hurtgen notes that, in *Yorkaire*, supra, he stated his view that the Second Circuit's reversal of the Board's decision in *Carpenter Sprinkler* was correct. Accordingly, in addition to the procedural reasons relied on by his colleagues, he would deny the Charging Parties' motion on the merits.